THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 192/12

In the matter between:

DULCE VITA CC	**APPELLANT**
and	
ADV CHRIS VAN COLLER	**FIRST RESPONDENT**
JACOBUS HENDRIK SCHABORT	**SECOND RESPONDENT**
THEODOR WILLEM V D HEEVER	**THIRD RESPONDENT**
PAUL DANEEL KRUGER	**FOURTH RESPONDENT**
PHILLIP DAVID BERMAN	**FIFTH RESPONDENT**
MAHOMED BHAROOCHI	**SIXTH RESPONDENT**
HUSEIN BHAROOCHI	**SEVENTH RESPONDENT**
THE LIQUIDATORS OF SPITSKOP VILLAGE (PTY) LTD (IN LIQUIDATION)	**EIGHTH RESPONDENT**
MASTER OF THE NORTH GAUTENG HIGH COURT	**NINETH RESPONDENT**
MASTER OF THE HIGH COURT CAPE TOWN	**TENTH RESPONDENT**
MR W L STEENKAMP	**ELEVENTH RESPONDENT**
GERT PETRUS JACOBUS VAN ASWEGEN	**TWELFTH RESPONDENT**
M BHAROOCHI & ANOTHER	**THIRTEENTH RESPONDENT**
MATTHYS ISAK CRONJE NO	**FOURTEENTH RESPONDENT**

Neutral citation: *Dulce Vita v Chris van Coller* (192/12) [2013] ZASCA 22 (22 March 2013)

Coram: MALAN, TSHIQI, MAJIEDT, PETSE JJA AND SOUTHWOOD AJA

Heard: 20 February 2013

Delivered: 22 March 2013

Updated:

Summary: **Neither the contravention of s 11 of the Banks Act 94 of 1990, by accepting deposits from investors in a 'public property syndication scheme' as defined in Notice 459 issued in terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 – nor the failure to comply with that Notice, by withholding the prescribed information – render the scheme itself or the agreements entered into to give effect to the scheme, unlawful and null and void ab initio**.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ismail J sitting as court of first instance):

I The appeal is upheld with costs such costs to be paid by the liquidators of Spitskop Village Properties Ltd (in liquidation) and to include the costs of two counsel.

II The order of the court a quo is set aside and replaced with the following order:

'The rule nisi is discharged with costs, such costs to be paid by the liquidators of Spitskop Village Properties Ltd (in liquidation).'

JUDGMENT

SOUTHWOOD AJA (MALAN, TSHIQI, MAJIEDT AND PETSE JJA CONCURRING):

[1] The issues to be decided in this appeal are (a) whether the 'public property syndication scheme' (the scheme) carried on by Spitskop Village Properties Ltd (Spitskop) was unlawful and void ab initio by virtue of the provisions of the Banks Act 94 of 1990 and the regulations issued in terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (Business Practices Act) and (b) whether all the agreements entered into pursuant to that scheme, particularly the agreements in terms of which investors invested in the scheme, the trust deed in terms of which the Steelpoort Debenture Trust (the Trust) was created and the mortgage bond registered over Spitskop's property in favour of the Trust, were unlawful and null and void ab initio as the court a quo (Ismail J, sitting in the North Gauteng High Court, Pretoria) declared.

[2] At the centre of the scheme were two men, Hendrik Christoffel Lamprecht (Lamprecht) and Jacobus Johannes van Zyl (Van Zyl), and the company of which they were directors, Bluezone Property Investments (Pty) Ltd (Bluezone), who conceived of and promoted the Spitskop Property Development which was the object of the scheme. The Spitskop Property Development envisaged the subdivision of the property in accordance with a general plan for the property showing public spaces, public amenities, road portions

and at least 2,500 residential erven, which necessitated the design and construction of the requisite services and, generally, the design, planning and construction of the township. Lamprecht and Van Zyl were businessmen and Bluezone was a member of the Bluezone group of companies.

[3] The properties involved are portions 6 and 7 of the farm Spitskop 333 which is situated in Mpumalanga, and together measure just over 198 hectares (the property). From the date of its purchase by Spitskop on 3 July 2006, until the liquidation of Spitskop on 21 August 2009 the property remained agricultural land.

[4] On 23 April 2003 Blue Dot Properties 1330 CC (Blue Dot), of which Lamprecht was the sole member, purchased the property for R1 000 057. On 1 August 2003 the close corporation was converted to a company, Blue Dot Properties 1330 (Pty) Ltd, with an authorised and issued share capital of R1 000 divided into 1000 ordinary par value shares of R1 each. Lamprecht was the sole subscriber to the memorandum of association and the sole member and director. On 1 October 2003 Van Zyl acquired 100 shares from Lamprecht and became a director of the company. On 9 June 2004 the authorised share capital was increased to R2 000 divided into 2000 ordinary shares of R1 each.

[5] On 18 March 2005 Bluezone was incorporated as a private company with an authorised share capital of R1 000 divided into 1000 ordinary par value shares of R1 each. On incorporation, Lamprecht was the sole director and his family trust the shareholder. On 4 August 2005 Van Zyl, Durandt van Zyl and Izak Jacobus Martinus van Niekerk also became directors and on 18 August 2006 Herman Bester became a director and company secretary. All the shares were then held by trusts of which Van Niekerk, Van Zyl, Durandt van Zyl and one Paul de Waal were beneficiaries.

[6] Bluezone was incorporated to carry on business by means of property syndication schemes and for this purpose ten other companies were incorporated in 2005. These were joined in 2006 by Bluezone International Properties (Pty) Ltd and Spitskop. Lamprecht was a director of all these companies. Van Zyl, Durandt van Zyl, Van Niekerk and Bester were also directors of a number of these companies, including Bluezone and Spitskop. The modus operandi adopted was that Bluezone would find a property to purchase and would

then identify a company in the group to acquire and hold the property to be used in the syndication.

[7] On 30 March 2006 the Minister of Trade and Industry, acting in terms of s 12(6) of the Business Practices Act published Notice 459 of 2006 (Notice 459) in Government Gazette No 28690 in which two 'business practices', as defined in the Notice, were declared unlawful with effect from 30 March 2006 and persons were directed to (a) refrain from applying the unfair business practices and (b) refrain at any time from applying the unfair business practices.

The business practice relevant in this case was defined as—

'the business practice whereby the prescribed information, in part or otherwise, as stipulated in annexure "A" is withheld by promoters or their representatives from investors or potential investors in public property syndication schemes';

a 'public property syndication scheme' was defined as-

'the assembly of a group of investors invited, by word of mouth or through the use of electronic and print media, inter alia, radio, television, telephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes by investing in entities, which could be companies, close corporations, trusts, partnerships or

individuals, whose sole asset(s) are commercial, retail, industrial or residential properties, and where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income';

and the 'prescribed information' meant—

'the prescribed information as stipulated in annexure marked "A".'

A 'promoter' included a company and its directors and all other persons who were actively involved in the forming and establishment of a public property syndication scheme. The Notice directed that promoters must make available in a disclosure document the prescribed information (the details of which were set out in annexure 'A') to investors who invest in or intend to invest in public property syndication schemes. The Notice also provided that any person who did not comply with the requirements of the Notice would commit a criminal offence and would be liable on conviction to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years, or to both that fine and that imprisonment.[1]

[1] This is what the Business Practices Act provides in ss 12(7) and 15.

[8] Spitskop was incorporated on 18 April 2006 under the name of Copper Sunset Trading 236 Ltd with an authorised share capital of R1 000 divided into 1000 ordinary par value shares of R1 each. On 18 April 2006 Lamprecht, Van Zyl, Durandt van Zyl, Van Niekerk and Bester were appointed its directors. In June 2006 the company changed its name to Spitskop Village Properties Ltd and also changed its main object to 'Property Investments and Developments'.

[9] On 3 July 2006:

(a) Spitskop and Blue Dot entered into an agreement in terms of which Spitskop purchased the property from Blue Dot for a purchase price of R118 300 000. This price included 'an access fee' of R26 million which Spitskop would pay to Blue Dot for allowing Spitskop access to the property 'for all purposes necessary . . . to obtain the Requisite Consents'. This access fee was to be paid within seven days of signature of the agreement. Although the property was undeveloped agricultural land the agreement was not conditional on Spitskop obtaining the right to develop a residential township on the property. Blue Dot sold the property to Spitskop voetstoots with no rights or improvements. Payment of the balance of the purchase price of R92 300 000 was to be effected on transfer of the property into the name of Spitskop. Lamprecht signed the deed of sale on behalf of Spitskop and Van Zyl on behalf of Blue Dot. Both were present at the two companies' directors' meetings when the resolutions were passed to purchase and sell the property. The purchase price was completely arbitrary and appears to have been a 'thumb suck' on the part of Lamprecht and not based on a proper valuation of the property. If it had been, the purchase price would not have exceeded R2 000 000;[2]

(b) the authorised share capital of Spitskop was increased to R425 000 divided into 425 000 ordinary par value shares of R1 each;

(c) Bluezone, as promoter, issued a disclosure document which dealt in detail with the scheme and the means by which investors could purchase units issued by Spitskop to enable Spitskop to raise the R425 million with which it would acquire, develop and market the property for the benefit of the investors. Investors were promised interest on their investments at about ten per cent per annum during each of the three years that it would

[2] In 2003 the property was purchased as agricultural land for R1 057 000. By 2006 it was still undeveloped agricultural land with no township rights. The valuations attached to the disclosure document were 'desktop valuations' on the basis that the property had township rights.

take to complete the project and on completion could expect a return on their capital of 20 per cent. A unit consisted of a R1 share linked with a debenture of R999. An investor therefore had to pay R1 000 for each unit, but in order to participate, had to purchase at least 100 units; an investment of at least R100 000. The terms and conditions of the debentures were set out and the disclosure document described the development project to be undertaken by Spitskop and provided a large amount of practical detail;

(d) Spitskop and Bluezone entered into a promoter agreement in terms of which Bluezone would be paid a promoter's fee for promoting the scheme. The promoter's fee was R2 million, payable when the property was transferred into the name of Spitskop, plus 30% of actual nett sales in excess of the projected nett sales of R524 770 000, payable on completion of the project. For purposes of the agreement, 'completion' meant that the residential erven comprising the development had been commercially exploited at the best prices available in the market. Lamprecht signed the promoter agreement on behalf of both Spitskop and Bluezone;

(e) Spitskop and African Spirit Trading 261 (Pty) Ltd, of which Lamprecht was the sole director, entered into a facilitator agreement in terms of which, in consideration for having facilitated the acquisition of the property 'for a substantially discounted purchase consideration', Spitskop undertook to pay to African Spirit Trading 261 (Pty) Ltd 15 per cent of the 'junior profit' (the difference between the actual project costs and the projected nett sales of R524 770 000) and 15 per cent of the 'senior profit' (after deducting the promoter's fee, the actual nett sales in excess of projected nett sales of R524 770 000). Lamprecht signed the facilitator agreement on behalf of Spitskop and Van Zyl on behalf of African Spirit Trading 261 (Pty) Ltd;

(f) Van Zyl on behalf of Spitskop and Nicolaas Johannes du Plessis signed the Steelpoort Debenture Trust Deed. The obligations of the Trust were (i) to administer the rights of the debenture holders (the holders of the linked units to be issued by Spitskop); (ii) to ensure that Spitskop was properly administered insofar as was necessary for the purposes of the Deed; (iii) to register and hold for the purposes of the Deed the mortgage bond to be registered over the property in favour of the Trustees to secure the debentures; (iv) in the event of a default of Spitskop as set out in the debenture terms and conditions, to enforce the rights of the debenture holders against Spitskop in accordance with the terms and conditions of the debentures and the powers of the Trustee as set out in the Deed, including the enforcement of the mortgage bond. In terms of the Trust Deed

Spitskop would pay the Trustee a fixed annual fee of R120 000 payable in two instalments as well as a variable fee where the Trustee was required to take active steps in terms of the Deed.

[10] The Disclosure Document (issued by Bluezone) referred to a number of professionals who were going to be involved in implementing the scheme:

(a) Honey Attorneys, who were to receive into their trust account all funds received from investors. Honey Attorneys also prepared the Disclosure Document and attended to the transfer of the property from Blue Dot to Spitskop;

(b) PDC Projects (Pty) Ltd (PDC), which was to be appointed as project manager. Lamprecht on behalf of Bluezone orally appointed PDC at a fee of R220 000 per month for a period of three years, which meant that PDC would be paid a total of R7.92 million excluding VAT;

(c) LED Inc, which was appointed as the auditor.

[11] Bluezone provided brokers with brochures and copies of the disclosure document and they commenced the marketing of the scheme to investors. In terms of the scheme the investors were required to complete the application form and pay the purchase price of the units to Honey Attorneys. Some investors did this before the offer was formally made in the disclosure document on 3 July 2006. By that date Honey Attorneys had already received more than R20 million from investors. Subsequently, about twelve hundred investors subscribed for the units and by early 2009 all the units were taken up. Between 3 July 2006 and 31 December 2007 Spitskop received approximately R350 million and by May 2008 the full amount of R425 million.

[12] On 23 July 2007, without insisting on transfer into its name, Spitskop paid the full purchase price of the property (R118 300 000) to Blue Dot. Spitskop also paid VAT on the transaction which amounted to R16 million. The directors of Blue Dot immediately divided the proceeds of the sale. Lamprecht received R95 653 000; Van Zyl received R5 500 000 and Bluezone R11 223 000.

[13] On 20 November 2007 Blue Dot transferred the property into the name of Spitskop and Spitskop registered a mortgage bond in favour of the Trust to secure the indebtedness

of Spitskop to the Trust in an amount of R425 000 000 and an additional amount of R850 000 for costs.

[14] In the meantime, Spitskop had from 3 July 2006 disbursed large amounts to Bluezone and the various professionals that it had employed. By 31 December 2007 Spitskop had received R351 491 254 and disbursed R269 939 305. Despite making little or no progress with the development, Spitskop continued to disburse its funds. Although a large proportion of the professional fees were disbursed by 4 March 2009, there had been no physical development of the property.

[15] It seems clear that the property development was doomed to fail. Land claims had been registered in terms of the Restitution of Land Rights Act 22 of 94; the holders of mineral rights over the property had not consented to the development; Spitskop had difficulty in complying with the Provincial and Local Authorities' requirements for the establishment of the township and there was no certainty that the company would be able to provide the bulk services of water, electricity and sewerage.

[16] In August 2009 a number of investors brought an urgent application for the liquidation of the company. It was common cause that Spitskop had lost its substratum and was unable to continue its operations. On 21 August 2009 the North Gauteng High Court, Pretoria (Bertelsmann J) granted a final order of liquidation.

[17] Shortly afterwards the Master of the Western Cape High Court, the tenth respondent, appointed Theodor Willem van den Heever, the third respondent, Paul Daneel Kruger, the fourth respondent and Phillip David Berman, the fifth respondent, as provisional liquidators of Spitskop.

[18] A first meeting of creditors of Spitskop was arranged for 22 October 2009 to be held before an officer of the Master of the High Court, Cape Town, the eleventh respondent.

[19] On 15 October 2009 Mahomed Bharoochi and Husein Bharoochi, in their capacities as trustees of the MB Gran Trust, an investor in Spitskop, urgently sought and were granted in the North Gauteng High Court, Pretoria (Molopa J) under case number

63649/2009 an order declaring that the scheme operated by Spitskop Village Properties Ltd (in liquidation) was unlawful. This final relief was granted without service of the papers on any other investors (there were more than 1200) who obviously had a direct and substantial interest in the relief sought, or any other interested party. The papers were served only on the three provisional liquidators and the fourth respondent, Kruger, acting without a mandate, instructed an advocate to appear on behalf of the liquidators and consent to the order, which he did.

[20] This order resulted in the rejection of the investors' claims which were presented at the first creditors' meeting by Nicolaas Johannes du Plessis, the trustee of the Trust. Du Plessis presented the claims on the basis that the agreements to invest and the debentures issued by Spitskop were valid. The eleventh respondent was persuaded by the liquidators' representatives that this was not correct.

[21] On 16 March 2010, Gert Petrus Jacobus van Aswegen, the twelfth respondent, launched an application in the North Gauteng High Court, Pretoria, under case number 16556/10 in which he sought as against the three provisional liquidators, Van den Heever, Kruger and Berman and the Bharoochis and others, inter alia, (a) an order that the order granted in case number 63649/09 on 15 October 2009 be rescinded and set aside; (b) that the rejection of Van Aswegen's and the other 1212 debenture creditors' claims at the first meeting of creditors be set aside; (c) that the nomination of Van den Heever and Kruger as final liquidators be set aside; (d) that, pending any further orders in case number 63649/09 (i) the Steelpoort Debenture Trust be continued to be recognised as a Trust in terms of its Trust Deed and (ii) the Master of the High Court, Gauteng, appoint Matthys Isak Cronjé as trustee of the Trust.

[22] The second, third, fourth, fifth and eighth respondents opposed the application and Kruger deposed to an affidavit on behalf of the liquidators. The Bharoochis did not oppose the application but filed an affidavit to explain the circumstances and reasons for bringing the urgent application.

[23] The application was heard in November 2010. Only Van Aswegen and the second, third, fourth, fifth and eighth respondents were represented. The parties agreed that the

order made on 15 October 2009 must be set aside and, after some debate, the court issued a rule nisi[3] with the return date on 9 February 2011. The crucial parts of the order were (a) that the syndication scheme conducted by Spitskop was declared illegal in terms of the Banks Act 94 of 1990 and in terms of the regulations issued in terms of the Harmful Business Practices Act 71 of 1988 and (b) that all agreements of whatsoever nature pursuant to the syndication scheme were declared null and void ab initio, particularly (i) the agreements in terms of which investors invested in the scheme; (ii) the trust deed of the Steelpoort Debenture Trust and (iii) the mortgage bond registered over the property in favour of the Trust.

[24] The return date was extended to allow for two parties to intervene in the proceedings. On 8 February 2011 Matthys Isak Cronjé, the new trustee of the Trust, applied for leave to intervene to oppose the confirmation of the rule and on 1 June 2011 the appellant, Dulce Vita CC (Dulce Vita), did the same. Kruger filed further affidavits in answer to the intervening parties' affidavits.

[25] On the extended return date only the liquidators and the appellant were represented. None of the applicants in case numbers 63649/09 and 16556/10 appeared. The court confirmed the rule at the instance of the liquidators who had launched a counter application for the relief sought in the rule nisi. The court a quo seems to have accepted an argument that the scheme was illegal because it was based on 'common law fraud' and consequently that the agreements were all *contra bonos mores* but did not deal with the issues referred to in the rule nisi. Unfortunately, neither the court that issued the rule nisi nor the court that confirmed the rule satisfactorily explained why the scheme and the agreements entered into pursuant to the scheme were unlawful. These are the two substantive issues to be decided in this appeal.

[26] Before considering these issues it is necessary to decide the preliminary issue raised by the liquidators just before the hearing in this Court: that Dulce Vita had no locus standi to oppose the order sought in the rule nisi and has no locus standi to appeal against the confirmation of the rule.[4] According to the argument this is because Dulce Vita failed to

[3] This order was sought by the liquidators. A draft order was handed to the court by the liquidators' counsel.
[4] The point was not raised before the court a quo.

show that it was an investor in the scheme. This requires a consideration of the way this was averred by Dulce Vita and dealt with by the liquidators in the affidavits.

[27] Dulce Vita's application to intervene was supported by a short affidavit deposed to by Quintin Olivier, a chartered accountant, who was a member of the close corporation. Olivier attached to this affidavit a second affidavit which he had deposed to, in which he set out Dulce Vita's evidence and contentions in some detail. In the first affidavit he alleged that in August 2007 Dulce Vita had invested an amount of R100 000 in Spitskop. In the second affidavit he repeated this allegation and stated that Dulce Vita was a creditor of the company in liquidation. The fourth respondent, Kruger, answered both affidavits in the same way. He did not dispute the allegations. He merely noted them and observed that Dulce Vita had not annexed any of the documents which it should have received in order to substantiate the investment and accordingly that it could not be determined 'at this stage' whether or not Dulce Vita was in fact an investor. Presumably, because its allegations were not disputed, Dulce Vita did not file a replying affidavit.

[28] Counsel for the liquidators contended that Dulce Vita cannot be a member because Dulce Vita's name does not appear in the lists of investors attached to the Trustee's affidavit which was submitted in proof of creditors' claims at the first meeting of creditors and which had been filed earlier in these proceedings.

[29] By the time Kruger deposed to his affidavit he had been a liquidator of the company for about two years. He had played a leading role in the litigation and he obviously had access to its books and records. In these circumstances it cannot be found that Kruger's affidavit created a dispute of fact on the issue of whether Dulce Vita had paid R100 000 to become an investor in the scheme. Kruger did not pertinently dispute Olivier's allegations about the investment and he somewhat disingenuously attempted to create doubt about its veracity. If Kruger had denied the allegations Dulce Vita could have dealt with the issue in a further affidavit. In my view the proper approach to the situation is that outlined in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed

the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

The liquidators must live with the consequences. They cannot now rely on other documents in the record to refute Dulce Vita's allegations that it made the investment. It is therefore accepted that Dulce Vita was and is a creditor of Spitskop and had locus standi to oppose the confirmation of the rule nisi and has locus standi in this appeal. I now turn to the real issues in the appeal.

[30] The liquidators' case was based solely on contraventions of Notice 459 and s 11 of the Banks Act.[5] Before the court a quo could declare the whole scheme and the agreements entered into pursuant thereto unlawful and null and void ab initio, it had to find in respect of one or both of the alleged contraventions:

(a) that Spitskop or Bluezone had contravened the relevant provision;

(b) that a contravention of the relevant provision rendered the whole scheme unlawful; and

(c) that if the whole scheme was unlawful, that rendered all the agreements entered into pursuant to the scheme unlawful and null and void ab initio.

In making these findings the court had to bear in mind that a scheme, as defined in this

[5] That appears clearly from the affidavits and the order sought by the liquidators before Pretorius J.

notice, is a systematic plan for the development, marketing and selling of a property, or properties, for the benefit of the investors who invest in the scheme. To achieve their object the promoters must enter into a multiplicity of agreements, first, to obtain the necessary finance from the investors, and then to acquire, develop, market and sell the property or properties. Against that background I shall first consider the contravention of Notice 459.

[31] The provisions of the Notice have already been referred to. They clearly and unambiguously declare the two defined 'business practices' unlawful. The relevant 'business practice' is the withholding of the prescribed information. The appellant does not dispute that Spitskop and Bluezone withheld prescribed information in a number of important respects. There was therefore a contravention of the Notice.

[32] As far as the second and third questions are concerned it is clear that the purpose of the notice was to declare only the two defined business practices unlawful. There is no indication in the notice that the Minister intended that if promoters withheld the prescribed information in relation to a particular scheme that scheme would also be unlawful. The notice simply cannot be sensibly interpreted in that way. Nevertheless the liquidators' counsel contended that even if this was not expressly stated in the Notice it was clearly the intention that if promoters withheld prescribed information in relation to a particular scheme the scheme itself would be unlawful. In this regard reliance was placed on the provisions of Notice 1135 of 1999 issued by the Minister on 6 June 2009 in terms of s 12(6) of the Business Practices Act in connection with *inter alia* 'pyramid proportional schemes' as defined, as well as the unreported judgment of Hartzenberg J in *Philip Fourie NO & others v Christiaan Serfontein Edeling & others* TPD Case No 1288/2003 February 2003 which was confirmed on appeal on the relevant issue by this Court in *Fourie NO & others v Edeling NO & others* [2005] 4 All SA 393 (SCA). Hartzenberg J found that Notice 1135 identified a 'pyramid scheme' as a 'harmful business practice' and declared it unlawful and further that the scheme in question was such a pyramid scheme and was therefore unlawful. Consequently he found that the effect was that all individual contracts were void. He also based this finding on the fact that every investment contract was *contra bonos mores* because the pyramid scheme was fraudulent in terms of the common law. On appeal to this Court the finding does not appear to have been the subject of any debate.

The Court said simply—

'[a]ll loans made to the scheme were — in the light of at least the provisions of s 11 of the Banks Act 94 of 1990 and a prohibition under the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 — illegal and therefore void; this proposition of law is uncontested.'

[33] There is a marked difference between the wording of the two notices which clearly reflects the difference in intention. In Notice 1135 the intention is clearly to outlaw pyramid schemes. In Notice 459 the intention is clearly to outlaw the business practices and not the public property syndication schemes. If the Minister had intended to do so she could easily have provided for this expressly. There would also be good commercial reasons for not declaring the whole scheme unlawful because the promoters withheld prescribed information. The information concerned could be insignificant and have no effect on the viability of the scheme and investors may wish to remain invested in the scheme to receive the benefits which they anticipated. The Minister was obviously satisfied that the severe criminal sanction contained in the Notice be the only consequence of a contravention.[6] The liquidators' reliance on Notice 1135 and the two judgments is therefore misplaced. The fact that the promoters did not disclose the prescribed information and were guilty of not complying with the requirements of Notice 459 therefore did not have the effect that the whole scheme or any part of it was unlawful. Consequently there was no basis for finding that all the agreements entered into pursuant to the scheme were null and void ab initio.

[34] As far as the Banks Act is concerned the first question to be answered is whether Spitskop contravened the provisions of s 11 which prohibits any person from conducting the business of a bank unless such person is a public company and is registered as a bank in terms of the Banks Act.[7] The primary business of a bank is defined in the Act as 'the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question'. The word 'deposit' is broadly defined and it is not in dispute that by receiving payment for the debentures Spitskop accepted deposits from the general public as a regular feature of its business. Most of the argument dealt with the question of whether Spitskop's acceptance

[6] See eg *Lupacchini NO & another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) paras 17 and 18; *Lynn NO v Coreejees* 2011 (6) SA 507 (SCA) paras 7 and 10.
[7] *Corpclo 2290 CC t/a U-Care & another v Registrar of Banks* [2013] 1 All SA 127 (SCA); [2012] ZASCA 156 para 2.

of the deposits against the issue of debentures was excluded from 'the business of a bank' because of the then provisions of para (*ee*) of the definition or whether this was nullified by a notice issued pursuant to para (*cc*) of the definition with which Spitskop's debentures admittedly did not comply. Because of the view I take of the other questions it is not necessary to deal with this issue.

[35] The difficulty facing the liquidators is simply that neither of the last two questions can be answered in the affirmative. The liquidators have not explained how the contravention of the Banks Act could result in the whole scheme being unlawful. There is no provision in the Banks Act which provides or even indicates that if the promoter of a public property syndication scheme, in contravention of the Banks Act, raises funds by accepting loans against the issue of debentures this would have the effect that the whole scheme is unlawful. Furthermore, this Court in *Gazit Properties v Botha & others NNO* 2012 (2) SA 306 (SCA) held that a contravention of the Banks Act does not result in the illegality of the agreements in terms of which deposits are made.[8] In *Gazit* the Court had to decide whether an agreement to lend money to a company which was unlawfully carrying on the business of a bank in contravention of s 11 of the Banks Act was unlawful because it was 'tainted'. The court held that there is nothing in the Act which leads to that conclusion and that the provisions of s 83 'which empower the Registrar of Banks to direct the repayment of money unlawfully obtained while unlawfully carrying on the business of a bank to repay such money, lead[s] ineluctably to the opposite conclusion'.[9] This conclusion in the judgment, contrary to the respondents' counsels' contention, is directly

[8] Paras 7 and 10.
[9] Para 10; *Oilwell (Pty) Ltd v Protec International Ltd & others* 2011 (4) SA 394 (SCA) para 19.

on point and has not been attacked as clearly wrong. It follows that if the loan agreements were not unlawful none of the other agreements such as the Trust Deed and Mortgage Bond were unlawful.

[36] The court a quo therefore erred in finding that the whole scheme was unlawful because Spitskop had contravened the provisions of Notice 459 and s 11 of the Banks Act and accordingly that the agreements entered into to implement the scheme were null and void ab initio. Accordingly the appeal must be upheld.

[37] Despite this conclusion it is clear that the promoters of the scheme, Lamprecht, Van Zyl, Durandt van Zyl, Van Niekerk and Bester, used a number of legal instruments to induce the gullible and the injudicious to invest large amounts of money in a scheme which, when properly analysed, never had a reasonable prospect of succeeding. It is also clear that some of the promoters abused their positions to pay themselves very large amounts from the funds which Spitskop had received. The evidence indicates that some, if not all, of the promoters, and possibly others, carried on the business of Spitskop recklessly or with intent to defraud the investors and are both civilly and criminally liable in terms of section 424 read with s 441 of the Companies Act 61 of 1973; that the promoters, and possibly others, did not comply with the requirements of Notice 459 and therefore committed a criminal offence punishable by a fine not exceeding R200 000 and or imprisonment for a period not exceeding five years, or by both that fine and that imprisonment; and that the promoters contravened s 11 of the Banks Act 94 of 1990 and are liable to a fine or to imprisonment for a period not exceeding ten years or to both such fine and imprisonment.

[38] The following order is made:

I The appeal is upheld with costs such costs to be paid by the liquidators of Spitskop Village Properties Ltd (in liquidation) and to include the costs of two counsel.

II The order of the court a quo is set aside and replaced with the following order:

‘The rule nisi is discharged with costs, such costs to be paid by the liquidators of Spitskop Village Properties Ltd (in liquidation)’.

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B R SOUTHWOOD
ACTING JUDGE OF APPEAL

APPEARANCES

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